Office - Supreme Court, U.S.
FILED
SEP 9 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-2068, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETROCHEMICAL ENERGY GROUP, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

AMERICAN GAS ASSOCIATION, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3342(c), which authorizes one House of Congress to pass a resolution disapproving a rule adopted by the Federal Energy Regulatory Commission concerning the incremental pricing of natural gas, is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions	3
Statement	3
Discussion	12
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 424 U.S. 1 ..... 11, 16, 17, 18
McLucas v. *DeChamplain*, 421 U.S. 21 21

Constitution, statutes and regulations:

United States Constitution:

Article I 3
Section 1 ..... 9, 13, 14
Section 7 ..... 9, 13, 14
Clause 2 13
Clause 3 13
Section 8 ..... 13, 14
Article II 3
Section 2, Clause 2 (Appointments Clause) 11
Section 3 16
Article III 3

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:

5 U.S.C. 551(5) 8
5 U.S.C. 553 6
5 U.S.C. 553(b)(B) 9
5 U.S.C. 553(c) 7

Constitution, statutes and regulations—Continued Page

Federal Trade Commission Improvements Act of 1980, Section 21(a), 15 U.S.C. (Supp. IV) 57a-1(a) 18
Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. (Supp. IV) 3311 *et seq.* 3
Section 201, 15 U.S.C. (Supp. IV) 3341 ..... 3, 4, 7
Section 202, 15 U.S.C. (Supp. IV) 3342 ..... 3, 4, 7, 20
Section 202(a), 15 U.S.C. (Supp. IV) 3342 (a) 4, 7, 8
Section 202(b), 15 U.S.C. (Supp. IV) 3342 (b) 7, 8
Section 202(c), 15 U.S.C. (Supp. IV) 3342 (c) 4, 6, 7, 8, 9, 20
Section 204(e), 15 U.S.C. (Supp. IV) 3344 (e) 5
Section 206(d), 15 U.S.C. (Supp. IV) 3346 (d) 3
Section 506, 15 U.S.C. (Supp. IV) 3416 ..... 3, 7
28 U.S.C. 1252 21
28 U.S.C. 1291 21
28 U.S.C. 2103 21
42 U.S.C. (Supp. IV) 7171(b) 13

Miscellaneous:

126 Cong. Rec.:
p. H3311 (daily ed. May 6, 1980) 5
pp. H3839-H3855 (daily ed. May 20, 1980) 5
p. H3855 (daily ed. May 20, 1980) 5

44 Fed. Reg. (1979):
p. 57726 5
p. 67170 5

H.R. Rep. No. 96-938, 96th Cong., 2d Sess. (1980) 5
H.R. Res. 655, 96th Cong., 2d Sess. (1980) 5
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 21

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2008

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2020

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2151

PETROCHEMICAL ENERGY GROUP, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 81-2171

AMERICAN GAS ASSOCIATION, APPELLANT

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 82-177

UNITED STATES SENATE, PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

No. 82-209

UNITED STATES HOUSE OF REPRESENTATIVES,
PETITIONER

v.

CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-104a)[1] is reported at 673 F.2d 425.

JURISDICTION

The jurisdiction of the court of appeals was invoked under 15 U.S.C. (Supp. IV) 3416(a)(4) (J.S. App. 17a-20a). The judgment of the court of appeals was entered on January 29, 1982 (J.S. App. 208a-209a). The order of the court of appeals granting the motions of the United States House of Representatives, the United States Senate, and the United States for leave to intervene was entered on March 2, 1982 (J.S. App. 105a). A petition for rehearing was denied on March 10, 1982 (J.S. App. 210a). The notices of appeal in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 were filed on March 15, 17,

---

[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 81-2008.

25 and 26, 1982, respectively (J.S. App. 213a, 215a, 217a, 220a),[2] and the jurisdictional statements were filed on April 29 and May 1, 21 and 24, respectively. On May 26, 1982, the Chief Justice granted the House of Representatives and the Senate an extension of time, to and including August 7, 1982, within which to file a petition for a writ of certiorari. The petition in No. 82-177 was filed by the Senate on August 2, 1982, and the petition in No. 82-209 was filed by the House of Representatives on August 6, 1982. The jurisdiction of this Court in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 is invoked under 28 U.S.C. 1252, and the jurisdiction of this Court in Nos. 82-177 and 82-209 is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Pertinent provisions of Articles I, II and III of the United States Constitution are reproduced at J.S. App. 222a-224a.

2. Sections 201, 202, 206(d) and 506 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3341, 3342, 3346(d) and 3416, are reproduced at J.S. App. 224a-231a.

STATEMENT

1. Title I of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, provides for the phased deregulation of natural gas prices. Title II provides for a system of incremental pricing to "eas[e] the transition to deregulation" (J.S. App. 7a). Incremental pricing is a mechanism for passing

---

[2] The Federal Energy Regulatory Commission also filed a notice of appeal, on March 25, 1982 (J.S. App. 219a), but it did not thereafter file a jurisdictional statement.

through to certain industrial users some of the increased price for natural gas resulting from phased deregulation, up to a level established by the cost of alternative fuels. It was designed to protect residential consumers against higher prices resulting from deregulation and to furnish some restraint on the prices paid by pipelines for natural gas supplies, particularly after deregulation, because large industrial users were expected to be especially price sensitive (*id.* at 7a-8a).

Under Title II of the Act, the implementation of incremental pricing is to occur in two phases. Section 201 of the Act, 15 U.S.C. (Supp. IV) 3341, directs the Federal Energy Regulatory Commission (FERC), within 12 months of the enactment date of the Act, to prescribe a rule providing for incremental pricing for the boiler fuel use of natural gas by any industrial boiler fuel facility. To implement Phase II, Section 202(a) of the Act, 15 U.S.C. (Supp. IV) 3342(a), in turn directs the Commission to prescribe an amendment to the Phase I rule, extending the rule generally to other industrial users of natural gas, not later than 18 months after the enactment date of the Act.

Under Section 202(c) of the Act, 15 U.S.C. (Supp. IV) 3342(c), the Phase II rule adopted pursuant to Section 202 must be submitted to each House of Congress. Section 202(c) provides that, following submission, the amendment "shall take effect" at the end of 30 calendar days of continuous session of Congress "unless, during such 30 day period * * * either House of the Congress adopts a resolution of disapproval * * * with respect to such amendment."

2. As required by Section 201, the Commission published a rule in October 1979 applying incremental pricing to industrial boiler fuel facilities.

44 Fed. Reg. 57726. On November 15, 1979, the Commission published a notice of proposed rulemaking for a Phase II rule extending incremental pricing to all industrial users of natural gas not specifically exempted under the Act. 44 Fed. Reg. 67170. On May 6, 1980, the Commission issued final Phase II regulations based on the notice issued the previous November (J.S. App. 12a, 123a-195a).

On the same day that the Commission adopted the Phase II rule, a resolution of disapproval (H.R. Res. 655, 96th Cong., 2d Sess. (1980); J.S. App. 222a) was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. See 126 Cong. Rec. H3311 (daily ed. May 6, 1980). The relevant Subcommittee approved the resolution by voice vote that same day, and the full Committee did likewise on May 7, 1980. See H.R. Rep. No. 96-938, 96th Cong., 2d Sess. 5 (1980). In its report to the full House, dated May 12, 1980, the Committee explained its position by noting that conditions in the energy market and in the economy had changed considerably since the Act was passed in 1978 and that there had not yet been sufficient experience with incremental pricing under Phase I (*id.* at 8-9, 13-14). The Committee also took issue with what it characterized as the Commission's narrow interpretation of its authority under Section 204(e) of the Act, 15 U.S.C. (Supp. IV) 3344(e), to establish the alternative fuel cost. H.R. Rep. No. 96-938, *supra*, at 10-11. Comments during floor debate on the resolution echoed the Committee report's main themes. See 126 Cong. Rec. H3839-H3855 (daily ed. May 20, 1980); J.S. App. 14a-15a. On May 20, 1980, the resolution of disapproval passed the House by a vote of 369 to 34 (*id.* at 15a; 126 Cong. Rec. H3855 (daily ed. May 20, 1980)).

3. a. After passage of the resolution of disapproval, appellee-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (collectively referred to herein as CECA) petitioned the Commission for rehearing. CECA sought an order making the Phase II rule effective, contending that the one-House veto provision in Section 202(c) of the Act is unconstitutional and that the resolution of disapproval passed by the House pursuant to that section therefore was of no legal effect (J.S. App. 15a).

By order dated August 1, 1980, the Commission denied the petition for rehearing and instead revoked the Phase II rule (J.S. App. 196a-203a). The Commission declined to pass upon the constitutionality of Section 202(c), stating that "sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation" (J.S. App. 198a). The Commission noted, however, that an argument could be made that if the legislative veto provision in Section 202(c) were held invalid by a court, the Phase II rule would take effect. The Commission stated that it "ha[d] not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program" (J.S. App. 199a) and explained that it was revoking the rule to permit it to make such an evaluation (*ibid.*).

b. CECA petitioned for rehearing of the revocation order, asserting that the Commission had no substantive authority to revoke the Phase II rule and that, in any event, the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, should have been followed (J.S. App. 16a). The Com-

mission denied the petition for rehearing by order dated October 2, 1980, concluding that Sections 201 and 202 of the Act empowered it to revoke the rule and that notice and comment requirements had been satisfied by the original notice of proposed rulemaking published on November 15, 1979 (J.S. App. 204a-207a). In the alternative, the Commission stated that there was "good cause" for dispensing with further notice and comment procedures (*id.* at 206a-207a, citing 5 U.S.C. 553(b)).

4. CECA then filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission's orders of August 1 and October 2, 1980 (J.S. App. 16a), again contending that Section 202(c) of the Act is unconstitutional. The United States Senate and House of Representatives appeared as amici curiae supporting the constitutionality of Section 202(c), and the United States appeared as amicus curiae arguing that the legislative veto provision is unconstitutional. FERC did not take a position on the constitutional question.

a. As an initial matter, the court disposed of a number of subsidiary issues raised by the House and Senate and by FERC: [3]

First, the court rejected the argument that it was unnecessary to decide the constitutional question because the legislative veto provision in Section 202(c) of the Act is not severable from the authorization in Section 202(a) and (b) for the promulgation of a

[3] In addition to the issues discussed in the text, the court rejected the arguments that the court of appeals did not have statutory jurisdiction of the case under 15 U.S.C. (Supp. IV) 3416 (J.S. App. 17a-20a) and that the constitutionality of the legislative veto presents a non-justiciable political question (*id.* at 43a-49a).

Phase II rule and that petitioners therefore were not in any event entitled to effective relief (J.S. App. 21a-30a). The court concluded, after reviewing the legislative history, that Congress would have enacted Phase II of the incremental pricing mechanism without the legislative veto device and that Section 202(c) thus was severable from the statutory authorization in Section 202(a) and (b) for issuance of a Phase II rule (J.S. App. 24a-30a). The court noted in this regard that the legislative veto provision was not contained in the incremental pricing bills passed by either House. Instead, the court observed, the veto provision was added by the conference committee, which failed even to mention, much less emphasize, this feature in the portion of its report that summarized Title II of the Act. This history, the court explained, "militates against the view that the veto provision was essential to the incremental pricing and [Natural Gas Policy Act] compromises" (*id.* at 25a).

The court of appeals also held that the case was not moot by virtue of FERC's attempted revocation of the Phase II rule, finding that FERC had failed to provide the notice and opportunity for comment required by the APA in order for the revocation to become effective (J.S. App. 31a-34a). The court rejected the Commission's contention that the opportunity for notice and comment provided in connection with the initial promulgation of the Phase II rule was sufficient to cover the order of revocation because one of FERC's options at the outset was to adopt no Phase II rule at all. The court noted that the APA defines the term "rule making" to include the process for repeal as well as adoption of a rule (5 U.S.C. 551(5)) and reasoned that this definition would have been unnecessary if notice and comment prior to adoption of a rule were

sufficient to encompass later repeal. In addition, the court remarked that the issues involved in the revocation decision—the constitutionality of the legislative veto and the consequenecs that might follow from a judicial decision—were different from those raised in the initial rulemaking proceeding (J.S. App. 32a-34a).

The court of appeals rejected the contention that FERC had "good cause," within the meaning of 5 U.S.C. 553(b)(B), to dispense with notice and comment procedures. The court observed that FERC had merely asserted that notice and comment were "unnecessary," without stating its reasons in the revocation order itself, as explicitly required by 5 U.S.C. 553(b)(B), and held that in any event no emergency existed warranting FERC's decision not to afford the public an opportunity to participate (J.S. App. 35a-36a).

b. On the merits, the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Act for two independent reasons. First, it held that the authorization for one House of Congress to adopt a resolution disapproving a rule promulgated pursuant to an Act of Congress violates the explicit requirements of Article I, Sections 1 and 7 of the Constitution, which the court described as establishing the "fundamental prerequisites to the enactment of federal laws" (J.S. App. 55a).

The court read the debates of the Constitutional Convention and the *Federalist* papers to reflect a concern on the part of the Framers to protect against improvident and encroaching action by the Legislative Branch and the possibility that majorities in the National Legislature might exercise unconstrained power that could destroy the power of the States. In the court's view, the Great Compromise, dividing the Con-

gress into two Branches, one representing the people and the other the States, served to guard against the latter eventuality, and the requirement of concurrent action by these two differently constituted bodies served as a check against the former (J.S. App. 70a-71a). Similarly, the court held that the provision for presentation of all legislative measures to the President for his approval or disapproval was intended by the Framers to be a "defensive weapon against legislative intrusions on the powers of the Executive" (*id.* at 64a) and a "check against ill-advised legislation" (*id.* at 65a). These important purposes underlying the procedural requirements for the exercise of power by the Legislative Branch required rejection of the suggestion that a legislative veto of agency action is exempt from those requirements.

The court "emphatically reject[ed]" the argument that the Phase II rule never had legal effect in the first place but rather was merely a "proposal" that could be rejected by one House of Congress without compliance with the bicameralism and presentation requirements. The court observed that the one-House veto "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect" (J.S. App. 74a). The court noted that a rule which is not disapproved does not die, as does a bill that fails to pass both Houses of Congress; rather, such a rule has legal force as the product of a valid authorization conferred on an agency by an Act of Congress (*id.* at 74a-79a). To render invalid a rule issued pursuant to such authorization, the court concluded, requires adherence to the "same procedure" followed in conferring the authorization in the first place, that is, concurrence of both Houses of Congress and presentation to the President for approval or veto (*id.* at 80a). Con-

versely, the court stated that "[i]f Congress had wanted FERC merely to propose an extension of incremental pricing to be accepted or rejected by Congress, it could have so provided" (*id.* at 74a-75a).

The court of appeals also held that the legislative veto violates the constitutional doctrine of separation of powers (J.S. App. 84a-103a). The court noted that this Court held in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the issuance of regulations represents the performance of a significant governmental duty pursuant to public law and therefore must be exercised by "Officers of the United States" appointed either by the President or as otherwise provided by the Appointments Clause (Article II, Section 2, Clause 2), not by officers appointed by Congress (J.S. App. 91a, quoting 424 U.S. at 140-141). In the court of appeals' view, it followed a fortiori from this holding that Congress itself likewise is prohibited from interfering in the rulemaking process, for "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over these officials' decisions" (J.S. App. 92a-93a).

The court rejected the suggestion that the Commission's status as an "independent agency" alters the separation of powers analysis (J.S. App. 88a-90a). The court noted that the status of the Federal Election Commission as an independent agency did not prevent this Court in *Buckley* from employing the separation of powers doctrine as the basis for reviewing the constitutionality of the statute establishing the Commission. The court recognized that the President "does not have a claim to control the decisionmaking of independent agencies" (*id.* at 89a). But the court found it to be "an enormous, and unwarranted, jump from this to the conclusion that Congress may itself

interfere with an independent agency's decisions without regard to separation of powers. Although FERC is substantially independent of the Executive, it nonetheless performs executive functions" (*ibid*).

c. In view of its decision on the merits, and its holding that FERC had not validly revoked the rule, the court of appeals concluded that the rule should go into effect. However, the court granted a stay of the effective date to permit the Commission an opportunity to reconsider the rule (J.S. App. 104a). After the court entered its judgment, the Senate, House of Representatives, and the United States were granted leave to intervene (*id.* at 105a).

DISCUSSION

Like the Ninth Circuit in *INS* v. *Chadha*, No. 80-1832, the court of appeals in this case has held unconstitutional a provision in an Act of Congress authorizing one House of Congress to adopt a resolution, without the concurrence of the other House or presentation to the President, that nullifies an order issued by a federal agency pursuant to its statutory mandate. The constitutionality of the legislative veto device presents an issue of the most fundamental nature regarding the distribution of powers among the coordinate branches of the federal government and the manner in which those powers may be exercised. That issue manifestly warrants, and already has been granted, plenary review by this Court. *INS* v. *Chadha* was fully briefed and argued last Term, and it has been set for reargument this Term. The same constitutional principles that govern *Chadha* govern this case as well, and the Court's decision in *Chadha* will, we believe, control here.

To be sure, this case involves a legislative veto of a rule, not an order entered at the completion of an

adjudicatory process, as in *Chadha*. In addition, the Officers of the United States responsible for promulgation of the rule in this case—the members of the Federal Energy Regulatory Commission—may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office (42 U.S.C. (Supp. IV) 7171(b)); they are not subject to removal by the President at will, as is the Attorney General, whose order of deportation was the subject of the legislative veto involved in *Chadha*. But neither of these differences between the two cases has any bearing on the resolution of the constitutional issue.

1.a. As we have explained in our Brief in *Chadha* (at 17-43), the explicit procedural requirements of bicameral action and presentation to the President set forth in Article I, Section 7 of the Constitution apply in all instances in which Congress seeks to exercise its legislative powers and thereby affect the legal rights and duties of persons outside the Legislative Branch. With respect to the requirement of bicameralism, this is clear from Article I, Section 1, which vests "*All* legislative Powers" jointly in the Senate and House of Representatives, and from Article I, Section 8, which provides that "The Congress," not either of its Houses standing alone, shall have the enumerated powers. With respect to the requirement of presentation to the President, Clause 2 of Article I, Section 7 makes clear that "*Every* Bill which shall have passed the House of Representatives and the Senate" must be presented to the President (emphasis added). And if there were any doubt, Clause 3 of the same section provides that "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" (emphasis added)—*i.e.*, all resolutions and votes constituting the exercise of the legislative powers conferred by

Article I, Sections 1 and 8—must be presented to the President, even if not actually in the form of a bill.

In view of the explicit and all-embracing constitutional text, the requirements of bicameralism and presentation to the President apply whether the conduct that is the subject of the congressional action is that of the President himself, subordinate officials in the Executive Branch subject to his control, the members of an "independent agency" who may be removed by the President only for cause, or members of the Judiciary, who are entirely independent of the President. These procedural requirements also must be followed whenever the legislative action will have a legal impact on private parties, as the resolution of disapproval in this case plainly did: absent the legislative veto, the Phase II rule issued by FERC pursuant to public law would have gone into effect and altered the prices consumers paid for natural gas. Moreover, just as the explicit text of Article I, Section 7 requires bicameral action and presentation to the President in the case of public laws of general applicability as well as private laws affording relief or benefits to an individual person, so too that text forecloses a legislative veto of agency action that does not comport with the constitutional requirements, irrespective of whether the veto disapproves an order adopting a rule affecting the public at large, as in this case, or an order entered at the conclusion of an adjudicatory proceeding that affords relief or benefits to an individual person, as in *Chadha*.

b. The intent of the Framers underlying the pertinent constitutional provisions no more permits any distinction to be drawn between *Chadha* and this case than does the text of the Constitution itself. The requirements of bicameral action and presentation to

the President were intended to serve as formidable checks against improvident action by the Legislative Branch by ensuring an opportunity for due deliberation by the two differently constituted Houses and an independent review by the President. See our Brief in *Chadha*, at 28-31. In this case, the court of appeals found that a principal reason for the passage of the resolution of disapproval was the dissatisfaction of many Members of the House of Representatives with the statutory policy of incremental pricing embodied in the Natural Gas Policy Act of 1978, in light of changed circumstances, and their view that this statutory policy should be abandoned or its implementation delayed. See J.S. App. 13a-15a, 79a-80a. As the court below observed, such alteration of policy embodied in a previously enacted law "is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power" (*id.* at 80a).

The requirements of bicameralism and presentation to the President also were intended to prevent an aggrandizement of the Legislative Branch at the expense of the other two Branches, and the Presidential veto power therefore also serves in part as a defensive weapon by which the President may protect against encroachment by the Legislative Branch. See our Brief in *Chadha*, at 27-28, 29-30. A legislative veto of an order issued by an independent agency does not nullify a specific action that was subject to the President's control. But this hardly renders the Presidential veto power superfluous, even to the extent it is viewed as a means of defense against aggrandizement and encroachment by the Legislative Branch.

Members of an independent agency such as FERC, no less than members of the Cabinet subject to Presi-

dential direction, are Officers of the United States appointed by the President and responsible for the administration of public laws. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140-141. The President's broad constitutional obligation to "take Care that the Laws be faithfully executed" (Article II, Section 3)—even if he cannot actually direct the *manner* of their execution in a particular instance—therefore requires preservation of the President's veto power within the system of checks and balances fashioned by the Framers as a defensive mechanism to protect against encroachment by the Legislative Branch upon the administration of the laws even by independent agencies. Indeed, precisely because the day-to-day administration of the laws by an independent agency is not subject to Presidential control, it is critical that the President's veto power be preserved undiminished to enable him at least to exercise the detached review of legislative measures the Framers intended when Congress, or one of its Houses, seeks to alter the manner in which such an agency carries out its statutory mandate.[4]

Moreover, if the check of the Presidential veto power could be readily circumvented by Congress merely by vesting authority to administer the laws in an independent agency not subject to the President's direct control, Congress could be expected to pursue that course, thereby further encroaching upon the President's administration of the laws generally and his responsibility to review legislative measures intended to alter the manner in which the laws are

---

[4] The Presidential veto power also may serve to prevent aggrandizement of the Legislative Branch at the expense of the Judiciary, which likewise is independent of Presidential control.

carried out. Thus, recognition of a power in Congress or one of its Houses to exercise a veto over the action of an independent agency in enforcing the laws, without presentation of the measure to the President, could substantially diminish the stature of the President in the tripartite system of government embodied in the Constitution. Such a result would quite directly implicate the self-defensive purposes of the Presidential veto power.

2.a. For reasons similar to those just discussed, the fact that the instant case involves rulemaking and an independent agency does not affect the second ground on which legislative veto devices are unconstitutional: their incompatability with the doctrine of separation of powers. The Court held in *Buckley* v. *Valeo* that the performance of any significant governmental duty pursuant to a public law must be performed by Officers of the United States appointed by the President or otherwise in accordance with the Appointments Clause; those duties may not be performed by officials appointed by Congress. As we explain in our Brief in *Chadha* (at 48-50), it follows a fortiori from *Buckley* that if Congress cannot appoint those who will administer the law, it cannot take the more extreme step of actually reserving to itself the ultimate determination of how the laws will be administered. And because the Court's opinion in *Buckley* explicitly applies to rulemaking (424 U.S. at 140), the doctrine of separation of powers invoked in *Buckley* likewise bars a legislative veto of agency rulemaking.

b. The conclusion that the legislative veto violates the doctrine of separation of powers is not altered by the fact that the members of FERC may be removed by the President only for cause. As the court

of appeals observed (J.S. App. 88a-89a), this Court in *Buckley* applied the doctrine and its particular manifestation in the Appointments Clause in the context of the Federal Election Commission, which also is an independent agency. It is true that the President does not have the degree of control over the decisionmaking of independent agencies that he does with respect to actions of Officers of the United States who are subject to his removal at will. But as the court below observed, "it is an enormous, and unwarranted, jump from this to the conclusion that Congress may itself interfere with an independent agency's decisions without regard to separation of powers" (J.S. App. 89a). If Congress reserves to itself or one of its Houses the authority to veto orders issued by an independent agency, it possesses the power both to make the law and participate in its execution—the very concentration of powers in the Legislative Branch that the Framers intended to foreclose.

3. The Constitution thus furnishes no basis for distinguishing this case from *Chadha* with regard to the validity of the legislative veto. Indeed, the Senate and House of Representatives do not argue that the two cases are constitutionally distinguishable. At the same time, we fully appreciate that the fundamental importance of the constitutional issue presented may lead the Court to conclude that it should have before it the experience with a second legislative veto in order to assure that all aspects of the issue have been addressed.[5]

---

[5] A constitutional challenge to the two-House legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), is now pending be-

4. In any event, whatever considerations might warrant plenary review in this case of the constitutionality of the legislative veto device plainly do not extend to the various subsidiary issues on which a number of parties also have sought review. A proliferation of such issues would detract from the Court's and the parties' consideration of the fundamental constitutional question.

Thus, for example, the question whether FERC was required to comply with the notice and comment requirements of the APA when it revoked the Phase II rule is not one of general importance, and FERC itself has not sought review on that issue. The court of appeals made clear that FERC could reconsider the wisdom of the rule in proceedings on remand (J.S. App. 104a).[6] This Court's refusal to consider the validity of FERC's revocation therefore would not result in the imposition of a Phase II rule that has not received appropriate scrutiny by the agency in light of changed circumstances.

Similarly, the questions of standing, political question, and adverseness of parties presented by the House (82-209 Pet. I (Questions 4, 5 and 6), 22-23,[7] are essentially identical to those presented by the House in its brief in *Chadha* and need not be re-

---

fore the United States Court of Appeals for the District of Columbia Circuit in a case involving a veto of the FTC's rule concerning deceptive commercial practices in sales of used cars. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737. That case is scheduled for argument on October 12, 1982.

[6] FERC has not yet taken action on remand in light of the appeals and certiorari petitions filed in this case.

[7] See also 81-2171 J.S. I (Question 1), 13-17).

hearsed here. By the same token, the questions regarding the scope of FERC's rulemaking discretion under Phase II and whether that discretion reflects an undue delegation of authority by Congress (81-2008 J.S. 13-14; 81-2020 J.S. I (Question 4), 25-27) were adverted to only briefly by the court of appeals (J.S. App. 78a n.172), which found that Congress had in fact made a policy judgment in favor of incremental pricing (*id.* at 79a). In any event, consideration of this issue would be premature in the context of the Phase II rule: that rule will not go into effect if the legislative veto is constitutional, and the rule will be the subject of further proceedings before FERC if the veto is unconstitutional and severable, as the court below held.

CONCLUSION

If the Court concludes that consideration of the constitutionality of the legislative veto in *Chadha* would be assisted by having this case before it as well, the Court should note probable jurisdiction in Nos. 81-2020 and 81-2171, which present the constitutional question. In that event, the Court also should grant the certiorari petitions filed by the House and Senate in Nos. 82-177 and 82-209, limited to the questions whether Section 202(c) of the Natural Gas Policy Act is unconstitutional and, if so, whether Subsection (c) is severable from the remainder of Section 202. The Court should limit the briefing in Nos. 81-2020 and 81-2171 to these issues as well. The appeals in Nos. 81-2008 and 81-2151 should be dismissed because they do not seek review of that aspect of the court of appeals' decision holding Section 202(c) of the Natural Gas Policy Act unconstitutional, which would appear to be a require-

ment for invoking the jurisdiction of this Court under 28 U.S.C. 1252.[8]

Respectfully submitted.

REX E. LEE
Solicitor General

---

[8] The first paragraph of Section 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." This language would appear to link the right of appeal to the holding of unconstitutionality by the lower court. See also *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Where an appeal pursuant to the first paragraph of Section 1252 has been taken, the second paragraph of Section 1252 provides that all other appeals or cross-appeals in the case shall be taken to the Supreme Court. It is this paragraph that would seem to apply to non-constitutional issues. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). When a district court disposes of a non-constitutional issue, appeal ordinarily would be to the court of appeals pursuant to 28 U.S.C. 1291; it presumably is such appeals of right that the second paragraph contemplates will be taken instead to the Supreme Court. There is no independent right of appeal to this Court from a decision of a court of appeals on a non-constitutional issue, and the second paragraph of Section 1252 does not confer such a right merely because some other party has filed an appeal with respect to the constitutional issue. We have addressed a close variant of this question of statutory construction in our Motion to Dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583 (filed Nov. 25, 1981).

Treating these jurisdictional statements as petitions for a writ of certiorari (see 28 U.S.C. 2103), the petitions should be denied, because they raise no issue of general importance warranting this Court's discretionary review.

SEPTEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 386834 1089